No. 8433

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. D. Bell,

Appellant,

vs.

Apache Maid Cattle Company, a Corporation, Babbitt Brothers Trading Company, a Corporation, The Arizona Livestock Loan Company, a Corporation, and H. V. Watson,

Appellees.

APPELLANT'S PETITION FOR REHEARING

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W. E. Patterson,

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Attorneys for Appellant.

THE MANUFACTURING STATIONERS INC., PHOENIX, ARIZONA

FILED

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Appellees.

PETITION FOR REHEARING

To the United States Circuit Court of Appeals for the Ninth Circuit and the Honorable Judges Thereof:

Comes now C. D. Bell, the appellant in the above entitled cause, and presents this his petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

I.

That there is manifest error, inadvertently arrived at, in the opinion and decision of this Court in this cause in that:

(a) The opinion and decision of the Court denies to appellant his appeal upon material matters, reserved and presented by the assignments of error herein.

(b) That the opinion and decision of the Court disregards, and fails to consider or determine, material matters or questions of error duly reserved and assigned as error herein, and thereby denies to appellant his appeal thereon.

(c) Although presented by the assignments of error, the question of the sufficiency of the complaint to state a cause of action *at law* was disregarded, and not considered or determined by the opinion or decision of the Court, thus denying to appellant his appeal thereon.

WHEREFORE, upon the foregoing grounds, appellant respectfully urges that this petition for rehearing be granted, and that the decree of the District Court be upon further consideration reversed.

Respectfully presented,

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First National Bank Bldg.,
Prescott, Arizona

STROUSS & SALMON,
CHARLES L. STROUSS,
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703 Heard Building,
Phoenix, Arizona.

Attorneys for Appellant.

I, Charles L. Strouss, of counsel for the above named C. D. Bell, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

CHARLES L. STROUSS,
Of Counsel for Appellant.

ARGUMENT

Under the assignments of error filed by the appellant, error was asserted and urged upon two grounds with respect to the granting of the motion to dismiss and the entering of the decree below, namely:

1. The Amended Bill of Complaint stated facts sufficient to constitute a cause of action within the equity jurisdiction of the District Court for relief by way of specific performance of the contract alleged, and it was error to dismiss the bill.

2. If equity jurisdiction is wanting, the Amended Bill of Complaint states a cause of action at law for damages for breach of contract, and the cause should have been transferred to the law side, and it was error to dismiss the bill.

> See Assignments of Error, Transcript of Record, Pages 22-24.
> Summary of Argument and Assignments of Error, Appellant's Brief, Pages 5-7.

The Court's opinion and decision considered the first proposition only, entirely disregarding the second proposition.

The last paragraph of the opinion and decision of the Court reads:

> "So many of the elements involved are so indefinite and uncertain that the lower court properly held that *the facts stated did not entitle appellant to a decree of specific performance.*" (Italics ours).

From this it is apparent that the Court has considered and determined *only* the sufficiency of the facts stated in the bill to entitle appellant to a *decree of specific performance.* No consideration is given to or decision made upon the error, duly and properly assigned, predicated upon the proposition that if equity jurisdiction is wanting the bill stated facts sufficient to constitute an action at law for damages requiring the cause to be transferred to the law side, and it was error to dismiss.

This proposition was asserted and urged by appellant, both in his briefs and on oral argument.

> See Appellant's Brief, Pages 12-15.
>
> Appellant's Reply Brief, Pages 2-6.

We respectfully submit that the effect of the Court's failure to consider and determine this Assignment of Error predicated upon the sufficiency of the facts stated in the bill to constitute a cause of action at law is to deny the appellant his appeal and hearing thereon.

In the Court's opinion it is stated:

> "Appellant entered into possession of the relinquished areas and he was not distrubed in any of his asserted rights until October, 1933, which is the date he alleges to have first discovered that any of his actual or supposed rights were to be curtailed."

We submit that the allegations of the bill of complaint do not support this statement. On the contrary, the allegation of the complaint is that "* * * said defend-

ants did in fact relinquish, and said Forest Service did allot to plaintiff, range and area sufficient to graze, run, and maintain not more than 640 head of cattle * * *" (top Page 11, Transcript of Record.) In other words, appellant never entered into possession of range sufficient to graze or run more than 640 head of cattle.

It is also stated in the Court's opinion: (Page 5)

> "The allegation is not that the appellees failed to waive a preference to graze 960 head of cattle covered by their permit but that they pretended to and that the relinquishment for 960 head was reduced to 640 by the Forest Service which had the authority so to do.
>
> "Appellant's argument is equivalent to the contention that the contract required appellees, for an indefinite future time, to relinquish from their grazing rights whatever amount might be necessary at various times to supply area sufficient for appellant to graze 960 head of cattle. * * *"

These statements, we submit, are not correct statements either as to the allegations of the bill or as to appellant's argument.

The allegations of the bill are that appellees pretended to relinquish range sufficient to run 960 head of cattle but that said appellees did in fact relinquish "range and area sufficient to graze, run and maintain not more than 640 head of cattle." In other words, the allegations of the bill are that the appellees failed to relin-

quish range or area sufficient to graze 960 head of cattle.

And the reason alleged is that prior to the making of the contract with appellant, the appellees had been informed by the Forest Service that appellees would be required to reduce their grazing rights under their permit, and appellees knew that, unless such reduction was absorbed by appellees from range rights retained by appellees "* * * the requirements of said Forest Service would extend and effect the relinquishment of range for the grazing and running of 960 head of cattle to be acquired by plaintiff pursuant to said contract * * *" (Page 9, Transcript of Record.)

Nor does appellant *contend* "that the contract required appellees, for an indefinite future time, to relinquish from their grazing rights whatever amount might be necessary at various times to supply area sufficient for appellant to graze 960 head of cattle." (Court's opinion, Page 5). The appellant contends that the relinquishment by the appellees, which purported to be for 960 head of cattle, was, by reason of the prior notice from the Forest Service to appellees of a required reduction in appellees' grazing permit and the concealment thereof by the appellees from appellant, a relinquishment for 640 head of cattle only. Appellant is not complaining of a reduction by the Forest Service of the range rights *relinquished to appellant.* Such is not the case stated. Under the Forest Service regulations such reduction could not exceed 20 per cent of the range right transferred. (See Appendix, Appellant's

Brief, Pages 23, 27 and 28.) Here the reduction equals one-third of the rights contracted to be relinquished.

Here the complaint is that, unknown to and concealed from appellant prior to the execution of the contract by appellee, the Forest Service had notified appellees of a required reduction of *appellees' permit* to graze 3174 head of cattle. The reduction of 320 head constitutes slightly over a 10 per cent reduction of appellees' total range rights. That because of such reduction and the requirements of the Forest Service appellees' purported relinquishment for 960 head of cattle was and could be effective as a relinquishment to appellant of range and area sufficient to graze only 640 head of cattle. To the extent of range rights for 320 head of cattle it constituted merely a relinquishment to the Forest Service of *the amount of the required reduction of appellees total range rights.*

To summarize, the appellant contends that the contract required the appellees to deliver relinquishments at the time of delivery, effective to relinquish *to appellant* range rights to graze 960 head of cattle and that appellees have breached their contract in that regard to appellant's damage in the sum of $5,120.

We have heretofore in Appellant's Brief and in Appellant's Reply Brief presented our contentions concerning the duty of the District Court to have trans-

ferred the cause to the law side. We will not here repeat but by reference incorporate here our argument in those briefs.

Respectfully submitted,

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